

CIVIL PROCEDURE – FALSE CLAIMS ACTION

Summary

Petitioner, Nevada’s Attorney General, appeals from the district courts’ refusals to dismiss actions brought under Nevada’s False Claims Act (“FCA”) by respondents, James McAndrews and Beeler, Schad & Diamond, P.C.

Nevada permits individuals to become private attorneys general, which grants individuals the right to sue on behalf of the state. This individual is known as a quitam plaintiff. After filing an action, the quitam plaintiff must send the Attorney General a copy of the complaint and a written disclosure of all material information, and then the complaint is sealed. The complaint remains sealed and the defendants are not served until the Attorney General decides whether to intervene. From here, the Attorney General may choose to intervene and to proceed with the action. If the Attorney General intervenes and elects to proceed with the action, the quitam plaintiff must relinquish control of the litigation but may remain a party to the action. On the other hand, if the Attorney General chooses not to intervene initially, the Attorney General may still later intervene upon timely application “if the interest of the State . . . in recovery of the money or property involved is not being adequately represented by the private plaintiff.”² In addition, the Attorney General may settle the action and “may move to dismiss the action for good cause.”³

Respondent, McAndrews, filed suit under the FCA against International Game Technology, Anchor Coin, Inc., and Spin For Cash Wide Area Progressive (“IGT”). McAndrews filed suit because IGT allegedly falsified tax records. After receiving a copy of McAndrew’s FCA complaint, the Nevada Attorney General asked the Nevada Department of Taxation (“tax department”) to perform an audit of IGT. The Attorney General then elected to intervene pursuant to NRS 357.080(4) and moved to dismiss the false claims action for several reasons: (1) the FCA does not cover tax matters; (2) Nevada’s tax-collection preempts false claims actions brought by private litigants based on tax deficiencies; and (3) good cause is present in order to dismiss the action. The district court denied the Attorney General’s motion to dismiss and held that the express language of Nevada’s FCA does not forbid tax deficiency claims. Furthermore, the district court found that the Attorney General failed to demonstrate good cause for dismissal because he had not demonstrated that the dismissal served a legitimate governmental purpose.

Respondent Beeler, Schad & Diamond filed suit under the FCA against several retailers who maintain stores or warehouses in Nevada. After receiving a copy of the complaint, the Nevada Attorney General declined to intervene. Nevertheless, the Attorney General later moved to intervene pursuant to NRS 357.130(2) for the purpose of filing a motion to dismiss. The district court denied the Attorney General’s motion to dismiss and concluded that an individual may appropriately bring tax deficiency claims under Nevada’s FCA. Again, the district court

¹ By Misti Kooyman

² NEV. REV. STAT. § 357.130(2) (2005).

³ NEV. REV. STAT. § 357.120(2), (3) (2005).

found that the Attorney General failed to demonstrate good cause. The Attorney General responded by filing a petition for a writ of mandamus or prohibition.

Beeler, Schad & Diamond asserted that since the Attorney General intervened later in the course of litigation, after originally declining, the Attorney General could not move to dismiss the action. Beeler, Schad & Diamond attempted to distinguish this from McAndrew's situation where, pursuant to NRS 357.120, the Attorney General could dismiss an action for good cause because he intervened without first declining. The Nevada Supreme Court disagreed and held that, in addition to allowing private individuals to bring false claims actions in situations where the claim arises from a tax deficiency, the Attorney General may move to dismiss the false claims action regardless of when he intervened.

Issue and Disposition

Issue

- (1) Does Nevada's FCA provide for a private individual to bring a false claims action in situations where the claim arises from a tax deficiency?
- (2) If the Attorney General initially declines to intervene but later decides to intervene, does this affect whether he may later move to dismiss the false claims action?

Disposition

- (1) Yes. In contrast to federal legislation, Nevada's FCA includes language that allows for a reverse false claims action but omits language that would forbid an individual from bringing a false claims action arising from a tax deficiency. However, a court must nevertheless engage in a burden-shifting analysis articulated in *Laraway v. Sutro & Co., Inc.*,⁴ which provides that a court must use rational basis scrutiny and decide whether the dismissal of an action brought under the FCA would serve a legitimate state interest.
- (2) No. Neither NRS 357.120 nor NRS 357.130 provides that a court may consider the Attorney General's motion to dismiss only after he has initially intervened, and federal courts have construed similar language in the federal FCA as allowing the government to move to dismiss a false claims action after initially declining to intervene.

Commentary

State of the Law before *International Game*

Prior to *International Game*, the Nevada Supreme Court had not addressed the issues of whether Nevada's FCA provided for a private individual to bring a false claims action in a situation where the claim arose from a tax deficiency and whether the Attorney General could move to dismiss a false claims action after initially declining to intervene. However, the Ninth

⁴ 116 Cal. Rptr. 2d 823 (Cal. Ct. App. 2002).

Circuit had addressed the issue of whether the Attorney General could move to dismiss a false claim action in *United States v. Baird-Neece Packing Corp. (Sequoia)*.⁵ The Ninth Circuit recognized that the government's ability to move for dismissal of a false claims action is broad but not unrestricted.⁶ The court likened the government's ability to move for dismissal to its prosecutorial discretion to enforce laws and determined that a court must engage in a rational basis analysis.⁷ Therefore, the government's actions must be rationally related to achieving a valid government purpose. *Laraway* additionally recognized that in interpreting California's FCA, the courts must interpret the meaning of "good cause" through statutory construction.⁸

Other Jurisdictions

As mentioned above, the Ninth Circuit and California courts have recognized that the government's ability to move for dismissal of a false claims action is broad and that the courts must interpret the government's ability to move for dismissal of a false claims action by examining the language of the statute.

In addition to examining the Ninth Circuit and California interpretations of false claim statutes, the Nevada Supreme Court looked to federal law for guidance on the issue of whether Nevada's FCA allows a private individual to bring a false claims action when the claim arises from a tax deficiency. Congress intended that the FCA apply to all types of fraud that would cause the government to lose money. When Congress originally enacted the FCA, it did not include any language permitting a person to bring a false claims action on behalf of the government. Furthermore, the federal Internal Revenue Code authorized against private suits on behalf of the government.

In 1986, however, Congress amended the FCA to allow for reverse false claims actions by private citizens. At the same time, Congress recognized that the reverse false claims provision would provide for tax deficiency claims, and Congress responded to this by explicitly barring tax claims in the federal FCA. Therefore, under federal law, a private citizen may not bring a false claims action in situations where the claims arise from tax deficiencies.

Effect of *International Game* on Current Law

International Game clarifies that the Nevada FCA differs slightly from the federal FCA in that private individuals may bring false claims actions in situations where the claims arise from tax deficiencies because the Nevada FCA does not explicitly provide otherwise. Furthermore, *International Game* clarifies that Nevada, like other states and the federal government, will allow the Attorney General to move for dismissal when he or she has good cause even though he or she initially declined to intervene in the false claims action.

Conclusion

Private individuals may bring false claims actions pursuant to Nevada's FCA in situations where the claims arise from tax deficiencies. In addition, the Attorney General may initially

⁵ 151 F.3d 1139 (9th Cir. 1998).

⁶ *Id.*

⁷ *Id.* at 1143, 1145.

⁸ 116 Cal. Rptr. 2d 823.

decline to intervene and may still move to dismiss a false claims action when he eventually chooses to intervene. In determining whether to grant the motion to dismiss, a court must engage in a burden-shifting analysis articulated in *Laraway*, which provides that a court must use rational basis scrutiny and decide whether the dismissal of an action brought under the FCA would serve a legitimate state interest.